Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1997

DOLE OCEAN LINER EXPRESS,

Petitioner,

v.

GEORGIA VEGETABLE COMPANY, INC.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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85 pp

QUESTIONS PRESENTED

1. May arbitrators, sitting pursuant to the authority conferred upon them by a contract, enter an award in favor of an entity not a party to the contract, and not a participant in the arbitration?

2. Are arbitrators bound by a liquidated damages clause contained in the contract that grants their authority, absent a finding that the clause is oppressive, unfair, or otherwise invalid?

STATEMENT OF CORPORATE AFFILIATIONS

The ultimate parent of Petitioner Dole Ocean Liner Express is Dole Food Company, Inc., a publicly-traded company with numerous subsidiaries and affiliates. Its headquarters are in Westlake Village, California. Petitioner has no non-wholly-owned subsidiaries.

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Dole Ocean Liner Express respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, vacating the order of the United States District Court for the Southern District of Mississippi in this case. Petitioner submits that, for the following reasons, the decision of the court below is inconsistent with binding precedents of this Court, and cannot be reconciled with the resolution of comparable cases in other circuits.

OPINIONS BELOW

This case concerns judicial review of an arbitral award. The several decisions of the courts below are set out in chronological order in the Appendix, *infra*. The decision of the Fifth Circuit of which review is sought, unpublished by order of that court, appears at the beginning of the Appendix, *infra*, and at 42a-44a. The denial of Petitioner's request for rehearing, also unpublished, is at p. 45a.

The decision of the district court, granting Petitioner summary judgment, which the court of appeals reversed, is published at 949 F. Supp. 467 (S.D. Miss. 1996), and is set out in the Appendix at pp. 29a-41a. The case had come before the district court on remand from the court of appeals. The earlier decision of the Fifth Circuit, published at 84 F.3d 772 (5th Cir. 1996), is at pp. 19a-26a, and the reconsideration resulting in the remand, 93 F.3d 166 (5th Cir. 1996), at pp. 27a-28a. The original decision of the district court, also awarding summary judgment to Petitioner, was not published, but is stored electronically at 1995 WL 846693 (S.D. Miss. 1995). It appears below at pp. 10a-18a.

For the convenience of the Court, Petitioner also sets out in the Appendix the opinion of the arbitrators that is at

issue in this matter, pp. 1a-9a, and the recent entry of judgment of the district court enforcing the arbitral award, following the last decision of the court of appeals, at pp. 46a-47a.

JURISDICTION

The court of appeals entered its judgment on January 8, 1998. A petition for rehearing was timely filed, and was denied on February 19, 1998. The mandate of the court of appeals was issued promptly thereafter. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision at issue is 9 U.S.C. § 10, which is set out in the Appendix at p. 48a.

STATEMENT OF THE CASE

A. Introduction

This dispute concerns an arbitral award of the Society of Maritime Arbitrators of the New Orleans Board of Trade, entered on June 30, 1995. *See infra*, pp. 1a-9a. The award was entered after an arbitration between the parties, in which Respondent Georgia Vegetable Company, Inc. ("Georgia Vegetable"), as shipper, alleged that Petitioner Dole Ocean Liner Express ("Dole"), the carrier, breached a contract of carriage between them.

The contract providing for arbitration also contained a liquidated damages clause, limiting either party's remedy for breach to $500 per occurrence. The arbitrators found that Petitioner had failed to provide some 62 containers for shipment of certain produce from Nicaragua to the United

States, and therefore that it had breached the carriage contract 62 times. Notwithstanding the liquidated damages provision, however, which would have limited Respondent's remedy to $31,000, they awarded Respondent $114,506.56 in its own right, and $550,606.50 in damages allegedly suffered by the Nicaraguan supplier of the onions, which was not a party to the contract of carriage, for a total of $651,113.06, plus interest[1]

Petitioner respectfully submits that under no circumstances can it be liable for an arbitral award of damages in favor of an entity that was not a party to the contract providing for arbitration (and with whom Petitioner had in fact expressly declined to contract), and that the arbitrators were constrained to honor the liquidated damages clause of the contract, unless they expressly and properly found it to be oppressive, unfair, or otherwise invalid.

B. Facts

Dole Ocean Liner Express ("Dole") and Georgia Vegetable Company, Inc. ("Georgia Vegetable") entered into a "Service Contract" ("the Contract") in 1993. The Contract called for Dole, as carrier, to provide to Georgia Vegetable, as shipper, a certain number of containers, permitting Georgia Vegetable to acquire in Nicaragua and to transport to the United States on Dole's ships certain cargoes of onions, over a period of six months, with additional increments of one year each.

Dole understood that Georgia Vegetable was acquiring the onions from Samuel Mansell Productos No Tradicionales, S.A. ("Manprosa"), a broker that apparently represents growers in Nicaragua. Dole had previously

[1] The arbitrators reduced their award by $14,000: an amount that both parties agree represents a debt from Respondent to Petitioner for unpaid freight.

declined to enter into a contract with Manprosa, citing difficulties it had previously encountered regarding unreliability of payment in that country.[2]

Apparently, Georgia Vegetable had a contract, styled a "Marketing Agreement," with Manprosa. That document, to which Dole was not privy and which it never saw until the arbitration hearing in this case, provided *inter alia* that, as between the parties, Respondent would be entitled to represent Manprosa's interests in certain types of litigation: defending claims of dissatisfaction on the part of buyers with the quality or delivery of the onions, and asserting such claims against third parties where appropriate. According to the Marketing Agreement, title to the onions remained at all times with Manprosa.

The Service Contract contained several provisions governing potential disputes between the parties. Section 7 was entitled "Liquidated Damages and Default," and, after setting out the liquidated damages of $500.00 per occurrence to be payable by Georgia Vegetable to Dole in the event of the former's breach, provided in relevant part as follows:

> 7.2 Default by Carrier. In the event that Carrier [*i.e.*, Dole] shall fail to transport containers duly tendered by Shipper [*i.e.*, Georgia Vegetable]

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[2] For this reason, among others, the parties agreed that the Service Contract should provide that "neither party shall have any right or authority to assume or create any obligation binding upon the other." Section 12. The arbitrators never attempted to reconcile this provision with their holding that the agency relationship between Georgia Vegetable and Manprosa effectively obligated Dole to arbitrate with the latter despite the lack of contractual privity. Inexplicably, Georgia Vegetable argued below that Dole's very refusal to contract with Manprosa supports the claim that privity of contract obtained between them nonetheless.

> pursuant to this Contract, to the extent Shipper must and does transport such containers on alternative ocean carrier's vessels, Carrier shall pay to Shipper a sum equal to the amount such alternative carrier's rates exceed the Base Rates of Carrier; **provided, however, that such sum shall in no event exceed $500.00 per container.** In the event that Shipper, after due diligence, is unable to ship on an alternative carrier, then providing Shipper exercised due diligence to locate and ship on an alternative carrier, Carrier shall pay to Shipper US$500.00 for each container not shipped by Carrier after duly tendered [*sic*] by Shipper.

Emphasis added.

The Contract also provided for arbitration in the event of any "dispute, controversy or claim arising out of or relating to" it. Section 14.4. The parties selected as their forum the Society of Maritime Arbitrators of the New Orleans Board of Trade,[3] and, in a choice of law clause, provided for "the procedural and substantive laws of the Maritime Law of the United States and, to the extent applicable, the State of Mississippi." Section 14.3. They conferred upon the U.S. District Court for the Southern District of Mississippi jurisdiction over any arbitral proceeding, including the confirming or vacating of an eventual award.

Dole subsequently breached the Contract by failing to provide containers in a regular and timely fashion. There is

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[3] Although the parties' designation of this body in the Contract was not technically correct, there is no dispute over their intention.

no dispute as to this, and there never has been. Nevertheless, Georgia Vegetable demanded arbitration, which was duly conducted on May 17, 1995. Both sides were represented by counsel, witnesses were heard, and documents were introduced and accepted into evidence. At the end of the proceedings, the arbitrators reserved their judgment, and, on June 30, 1995, they entered their award ("the Award").[4]

C. The Arbitral Award

The arbitrators found that Dole had failed to provide Georgia Vegetable with 62 of the 170 containers the Shipper had reasonably requested under the Contract. Although the Contract expressly limited the damages for which Dole might be liable in such circumstances to $500 per event, the panel went on to calculate an award in two parts: the commissions Georgia Vegetable allegedly lost because of its inability to transport the subject 62 containers of onions, which it set at $1,846.88 per container; and the net payments that would have been due not to Georgia Vegetable, but to its Nicaraguan supplier, Manprosa, which were said to be $8,890.75 per container. The Award was therefore for an aggregate of $10,727.63 per container, or $665,113.06.[5]

The arbitrators found that Georgia Vegetable was specifically authorized to seek arbitration with Dole on Manprosa's behalf, on the strength of the following excerpt from an unnumbered paragraph of their Marketing Agreement:

> [T]he Receiver [*i.e.*, Georgia Vegetable] shall have the right and responsibility to handle any

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[4] A copy of the Award is attached hereto as Appendix pp. 1a-9a.

[5] The Panel reduced the Award by $14,000, representing unpaid freight that was due to Dole and as to which there has never been a dispute. *See* footnote 1, *supra*.

> type of litigation or take any other action related to said onions should the need arise. All of this shall be handled at the sole discretion and according to the best judgment of Georgia Vegetable Company, which may handle such matters in its own name just as if it were the owner of said onions.

App., p. 4a.

The arbitrators' discussion, however, ignored the introductory words of the paragraph from which they quoted, which are as follows:

> **Should any purchaser be dissatisfied with any of the onions of the Grower** [*i.e.*, Manprosa], then . . .

Marketing Agreement, emphasis added.

The arbitrators also discarded the liquidated damages provision, apparently if implicitly because it was not a "reasonable pre-estimation" of the injury ultimately suffered by the non-breaching party, here Georgia Vegetable. In making this comparison, however, they contrasted the liquidated amount of $31,000 not with Respondent's alleged damages of $114,506.56, but with the **combined** damages of Respondent and Manprosa, or $651,113.06.

D. The Proceedings Below

Dole moved to vacate the Award, on the grounds that the arbitrators had exceeded their authority under 9 U.S.C. § 10(a)(4). The gravamen of Petitioner's contention was twofold: that the Panel had no right to award relief to Manprosa, which was a party neither to the arbitration nor to the Contract that gave the arbitrators their power; and that, on a correct comparison of the liquidated damages amount

and the injury allegedly suffered by Respondent alone, the contractual provision was not invalid as a matter of law, and therefore bound the Panel.

The district court awarded summary judgment to Dole, finding that Manprosa was not in privity with Dole and therefore could not be compelled to arbitrate with it, and that there was no basis for the arbitrators to ignore the liquidated damages clause of the Contract. *Dole Ocean Liner Express v. Georgia Vegetable Co., Inc.*, No. 96-60885, 1995 WL 846693 (S.D. Miss. Nov. 22, 1995) (*Dole I*), App., pp. 10a-18a.

A panel of the U.S. Court of Appeals for the Fifth Circuit reversed. *Dole Ocean Liner Express v. Georgia Vegetable Co.*, 84 F.3d 772 (5th Cir. 1996) (*Dole II*), App. 19a-26a. The grounds for reversal were very specific: the court held that, under the Marketing Agreement between Manprosa and Georgia Vegetable, which was not before the court:

> [t]here is no question that Georgia Vegetable had the right to seek damages on behalf of Manprosa as its agent. Manprosa **explicitly** authorized Georgia Vegetable to handle any type of litigation concerning the onions, 'in its own name just as if it were owners of said onions.'

Dole II, 84 F.3d at 775 (emphasis in original), App. 24a-25a.

In fact, the Marketing Agreement said no such thing. On the contrary, the original context of the phrase cited by the court clearly demonstrates that there was **no** general authority for Georgia Vegetable to arbitrate this case on behalf of Manprosa: the specific grant of authority for dispute resolution was limited to certain kinds of issues

related to purchasers of the onions only, and did not include the case at Bar.

Upon receiving the court's decision, counsel for Dole promptly moved to reconsider it, and filed another copy of the missing document, which the Court agreed to receive. Up until that time, Georgia Vegetable had never argued anything **other** than that the Marketing Agreement created an agency relationship under which Georgia Vegetable was agent for its seller Manprosa, by virtue of a particular cited clause of that Agreement.

Once the Fifth Circuit actually had the text of the Marketing Agreement before it, the court could see that it did not say what Georgia Vegetable had represented. The panel remanded the case to Judge Russell for determination of the meaning of the Agreement, and directed that the arbitrators' construction of that document was not entitled to any special deference. *Dole Ocean Liner Express v. Georgia Vegetable Co.*, 93 F.3d 166, 167 (5th Cir. 1996), App. 27a-28a (*Dole III*).

Again the district court awarded Dole summary judgment. *Dole Ocean Liner Express v. Georgia Vegetable Co.*, 949 F. Supp. 467 (S.D. Miss. 1996), App. 29a (*Dole IV*). Judge Russell found that **no** provision of the Marketing Agreement -- not the one relied upon by Georgia Vegetable before the arbitrators, the district court, and the court of appeals, nor any other clause of the same document claimed by Georgia Vegetable as potentially relevant at the time of the remand -- made Respondent an agent for Manprosa. Judge Russell also held that the liquidated damages clause set agreed damages as just under a third of the injury actually suffered by Georgia Vegetable (as opposed to Manprosa), and thus was a "reasonable pre-estimate" as a matter of Mississippi law.

Before the Fifth Circuit once again, Respondent adopted yet another strategy. Now, the Marketing Agreement did not **create** the agency between the Nicaraguan supplier and Georgia Vegetable, its customer, but merely **confirmed** it. The putative agency, Georgia Vegetable now argued, was entirely independent of the Marketing Agreement, since its valiant efforts to ground it in that document had so dramatically failed. *See* App. 32a (noting that Georgia Vegetable had conceded "the inapplicability of the sole provision upon which the arbitrators relied in finding an agency relationship between [itself] and Manprosa"). Yet the *per curiam* decision of the Fifth Circuit now under discussion, *Dole Ocean Liner Express v. Georgia, Vegetable Co.*, No. 96-60885 (5th Cir. January 8, 1998) (*Dole V*). App. 42a-44a, resolves these questions against Dole without even mentioning them.

The decision of the panel below -- barely over two pages in length -- does not reach issues concerning agency, the interpretation of the Marketing Agreement between Manprosa and Georgia Vegetable, the possibility of compelling arbitration in the absence of privity, or the reasonableness of liquidated damages provisions: the questions briefed by both sides here and below, and the gravamen of the arbitrators' and Judge Russell's decisions. Rather, the court determined as a matter of fact that Dole "should have been aware that Georgia Vegetable would seek to enforce the [contract with Dole] on behalf of Manprosa." App. 43a.

It purported to base this conclusion on four facts it found were "undisputed": that Dole originally solicited Manprosa's business, that Manprosa introduced Georgia Vegetable to Dole, that Manprosa "delegated authority to negotiate carriage" to Georgia Vegetable, and that Dole

refused to allow Manprosa to become a party to its contract. *Id.*

None of these conclusions is relevant[6] to the question whether Respondent was Manprosa's agent for the purpose of conducting the arbitration that resulted in the award against Petitioner. Absent such a finding, the court below did not demonstrate any basis for not following its own decisions as well as those of other Circuits to the effect that a party cannot be compelled to arbitrate with another in the absence of contractual privity.

The court of appeals denied Petitioner's timely request for rehearing, App., p. 45a, and this Petition for review by this Court followed.[7]

E. Summary of Argument

Dole respectfully submits that the Award was beyond the arbitrators' jurisdiction to the extent that it ordered payment to Manprosa, which was not a party to the Service Contract and did not appear before the arbitrators. Several of the Circuits -- including the Fifth -- have heretofore scrupulously adhered to the teachings of this Court to the effect that arbitration is a creature of contract, and therefore cannot confer rights or impose obligations on persons not bound to each other by contract. The decision below cannot be squared with those precedents.

Furthermore, a contractual limitation of damages is binding on arbitrators, and they therefore have no authority to make an award in excess of what the parties had

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[6] Nor, in fact, was the third proposition "undisputed," as is shown *infra*.

[7] Following the second remand to the district court, Judge Russell entered judgment reinstating the arbitrators' award in full on March 25, 1998. *See* App. 46a-47a.

contractually agreed, in the absence of a determination that, for public policy or other recognized reasons, the liquidated damages provision is oppressive, inequitable, or otherwise invalid. None of those was, or could have been, the finding of the arbitral panel or of any court below.

REASONS FOR GRANTING THE WRIT

I. A PARTY CANNOT BE COMPELLED TO ARBITRATE WITH SOMEONE WITH WHOM IT IS NOT IN PRIVITY OF CONTRACT

As this Court has recently taught, in *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S. Ct. 1920, 1924 (1995) "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration." Dole never agreed to arbitrate claims that Manprosa might have; indeed, it never agreed to arbitrate with, or even to be bound contractually to, Manprosa in any way at all. An award in favor of a non-party -- that is, to an entity to whom no contractual agreement to arbitrate was ever given -- is grossly in excess of arbitrators' authority, and therefore requires that the award be set aside, pursuant to 9 U.S.C. § 10(a)(4).

The panel decision is facially inconsistent with the pronouncement of this Court in *First Options of Chicago*. As explained by the United States Court of Appeals for the District of Columbia Circuit, "arbitration is a matter of consent; 'it will not be imposed on parties beyond the scope of their agreement.'" *U.S. Postal Serv. v. National Rural Letter Carriers Ass'n*, 959 F.2d 283, 287 (D.C. Cir. 1992) (quoting *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 201 (1991)). A party to a contract cannot be forced to

arbitrate disputes with someone with whom it is not in privity, and with whom it never had an agreement to arbitrate. *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 648 (1985); *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir. 1990). And Dole never agreed, by word or deed, to arbitrate any dispute it might have had with Manprosa, with whom not only was it not in privity, but with whom it had expressly declined to enter a contract.

Several Circuits have held specifically that "arbitrators exceed their powers when they determine rights and obligations of individuals who are not parties to the arbitration proceedings." *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995), *cert. den. sub nom. Sac-Co, Inc. v. Global Info. Solutions Co.*, ___ U.S. ___, 116 S. Ct. 272 (1995); *see also International Bhd. of Elec. Workers v. O.K. Elec. Co., Inc.*, 793 F.2d 214 (8th Cir. 1986); *American Renaissance Lines, Inc. v. Saxis S.S. Co.*, 502 F.2d 674, 677 (2d Cir. 1974).

The case at bar presents a situation strikingly similar to that involved in *NCR Corp.*, in which the Sixth Circuit affirmed the vacating of an award of punitive damages to nonparties. 43 F.3d at 1080. That court found that the arbitrator exceeded his authority by resolving a dispute which may or may not have existed between NCR and its "other non-servicing dealers" (*i.e.*, not those before the tribunal), and by determining the rights of individuals who were not parties in the arbitration proceedings. *Id.*

The seminal case enunciating this doctrine, that only parties may be subject to obligations as part of arbitral awards, is *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp.*, 312 F.2d 299 (2d Cir.), *cert. den.*, 373 U.S. 949 (1963), in which the U.S. Court of Appeals for the Second Circuit affirmed a decision to vacate an arbitrator's

award, purporting to determine the obligations of a corporation "clearly not a party to the arbitration proceeding." 312 F.2d at 300. The Seventh Circuit closely followed *Orion* in *Transportation Cybernetics, Inc. v. Forest Transit Comm'n*, 950 F.2d 350, 354 (7th Cir. 1991) (applying *Orion*'s rule to look at the four corners of the arbitration agreement, in order to determine which parties the arbitration award may affect).

Even the Fifth Circuit itself has addressed the issue of awards to non-parties, and held in a similar situation that two parties which did not agree to arbitrate disputes between them cannot be compelled to do so. *Del E. Webb Constr. Co. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987). In *Del E. Webb*, the court invalidated an order requiring two entities, A and B, each with an arbitration agreement with a common third party C, to resolve the disputes between themselves in a consolidated arbitration with C, despite the lack of an arbitration agreement directly between A and B. *Id.* Although each had expressed a contractual willingness to arbitrate disputes with the third party, they had never agreed to arbitrate as between themselves, and in such circumstances arbitration therefore could not be compelled.

In the instant case, by the logic of *Orion*, *NCR*, and *Del E. Webb*, Dole could not have been compelled to arbitrate its dispute with Manprosa by virtue simply of the Marketing Agreement between Manprosa and Georgia Vegetable, whatever its terms. Nor did Dole at any stage of its proceedings with Georgia Vegetable waive or abandon any right it had not to be compelled to arbitrate disputes that Manprosa might seek to raise. To grant damages to Manprosa, a party neither to the arbitration proceeding nor to the Contract from which the arbitrators' authority arose, was not merely a mistake of law, but a clear violation of the arbitrators' limited contractual powers. The arbitrators

purported to resolve a dispute between Manprosa and Dole which was not properly before them, and to determine the rights of Manprosa and the correlative obligations of Dole, although the former was not a party to any contract with Dole, and did not participate in the arbitration either directly or through an agent empowered to act to protect its interests.

The decision of the panel below cannot be reconciled with any of the cited determinations of this Court, of other courts of appeals, or, considering *Del E. Webb*, of the Fifth Circuit itself.[8] And when arbitrators "exceed[] the express limitations of [their] contractual mandate, judicial deference ends and vacatur or modification of the award is an appropriate remedy." *Bruce Hardwood Floors v. UBC, Southern Council of Indus. Workers*, 103 F.3d 449, 452 (5th Cir. 1997), citing *Delta Queen S.S. Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. den.*, 498 U.S. 853 (1990).[9]

The panel below, both times it reviewed the summary judgments of the district court, conceded that Manprosa was not in privity with Petitioner, but concluded that *Del E. Webb* and *Delta Queen* were inapplicable because, in the court's

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[8] *See also Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34 (5th Cir. 1990).

[9] The notion that the arbitrators' authority derives from the essence of the contract empowering them was most famously articulated by this Court in *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960) ("Nevertheless, an arbitrator is confined to interpretation and application of the . . . agreement; **he does not sit to dispense his own brand of industrial justice**. He may of course look for guidance from many sources, **yet his award is legitimate only so long as it draws its essence from the . . . agreement. When an arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.**") Emphasis added.

view, Georgia Vegetable participated in the arbitration on Manprosa's behalf. But there are several important reasons why this conclusion cannot be sustained.

Before the arbitrators, Respondent contended that it was Manprosa's agent charged with representing it pursuant to an express contractual grant: never mind that Dole never knew about this alleged assignment of responsibility, and never mind the provision in ¶ 12 of the contract between Petitioner and Respondent that "neither party shall have any right or authority to assume or create any obligation binding upon the other." The arbitrators accepted Respondent's contention only by taking language out of context: in fact, the agency conferred on Georgia Vegetable by Manprosa was for very specific and limited purposes, which did not include the participation in arbitration with Dole.[10] But Respondent did not inform either court below of this fact.

Judge Russell punctured that particular trial balloon, holding simply that Manprosa was not a party to the arbitral proceedings or to the Contract authorizing them, and therefore that the arbitrators had no authority to enter an award in its favor. The court of appeals reversed, relying exclusively on its interpretation of a provision of the Marketing Agreement between Georgia Vegetable and Manprosa. It held that:

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[10] The language upon which Georgia Vegetable relied was the unitalicized portion of this provision of the agreement between Manprosa and Respondent: "*Should any purchaser be dissatisfied with any of the onions of the grower [i.e., Manprosa],* then the receiver [*i.e.* Georgia Vegetable] shall have the right and the responsibility to . . . handle any type of litigation, or take any other action related to said onions should the need arise." The italicized portion was presented to the court by Petitioner, and it was promptly and correctly recognized as vitiating the claim that this provision created an agency for Respondent to arbitrate disputes with Dole on behalf of Manprosa.

> [t]here is no question that Georgia Vegetable had the right to seek damages on behalf of Manprosa as its agent. Manprosa *explicitly* authorized Georgia Vegetable to handle any type of litigation concerning the onions, "in its own name just as if it were owners of said onions." "A person with whom an agent makes a contract on behalf of a principal is subject to liability in an action brought thereon by the agent in his own name on behalf of the principal if the agent is a party promisee." Furthermore, the contract between Dole and Georgia Vegetable required the arbitration of "[a]ny dispute, controversy or claim, arising out of or relating to [the] contract or a breach thereof . . ." From Dole's perspective, the two entities were one for purposes of recovering under the contract. Because Georgia Vegetable was free to sue Dole on behalf of Manprosa, we believe it was entitled to also seek arbitration.

App. 24a-25a, emphasis in original, footnotes omitted.

The problem with this conclusion, however, as the court below was shortly to learn, was not that its logic was faulty, but that its premise was untrue. There was no "explicit" grant of agency in general, or of authority to arbitrate in particular, from Manprosa to Respondent. Petitioner lodged the errant document with the court of appeals, which on that basis reconsidered its decision and remanded to the district court, for the express purpose of construing the agreement between Manprosa and Georgia Vegetable. The question remanded, in other words, was whether, in light of what that Agreement actually said (as opposed to what Respondent was maintaining it said), there

was a basis for the holding that Georgia Vegetable had participated in the arbitration with Dole as Manprosa's agent. And the court reminded the trial judge that he was not required to pay any particular deference to the arbitrators' view of the Manprosa-Georgia Vegetable Agreement, since the arbitrators "do not have . . . extensive authority to interpret" that Agreement, as they do the Contract under which they derive their power. App. 28a.

On that remand, Respondent changed its course entirely. No longer did it derive its theory of agency for Georgia Vegetable to arbitrate disputes on behalf of Manprosa from the only clause of the Agreement between them upon which it had ever relied.[11] Rather, it found that authority elsewhere, in another express provision of its Marketing Agreement with Manprosa: ¶ IX, a provision never mentioned by the arbitrators, the trial court, or the court of appeals.

But that reliance was equally misplaced. Even if it were open for a court reviewing an arbitral award to find one of the parties before it to have standing as an agent on a theory entirely different from the one Respondent itself presented to the arbitrators, ¶ IX simply did not do the job: it concerned only claims over damage to onions during shipping and handling, not disputes concerning contracts of carriage, and the failure to supply all of the containers required under such an agreement. So ¶ IX of the Agreement too was as unavailing to sustain Respondent's contention as

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[11] As Judge Russell noted, "the provision obviously does not provide the requisite authority to represent Manprosa in a dispute with Dole, since Dole was not a purchaser of the onions dissatisfied with their quality." App. 32a.

had been the provision that it mercifully abandoned on remand to the district court.[12]

Respondent had, therefore, proffered two entirely different theories under which it claimed to be Manprosa's agent for the specific purpose of conducting an arbitration with Dole, and both were transparently inapplicable. The simple truth is that Georgia Vegetable was not an agent for Manprosa: it was simply a purchaser of Manprosa's products, a relationship that does not typically generate an agency for any purpose.[13]

In the decision that Petitioner seeks to have reviewed on certiorari, the Fifth Circuit did not purport to locate an agency relationship elsewhere. In effect, it dispensed with that requirement entirely, concluding that Georgia Vegetable could seek and conduct arbitration on behalf of Manprosa, not because it had authority to act as its agent, but only because "[t]he arbitrators determined that Dole should have been aware that Georgia Vegetable would seek to enforce the Service Contract on behalf of Manprosa." App. 43a.

Given its view concerning what Dole "should have been aware" of -- which no longer embraced the general or specific agency on which Respondent had exclusively relied before the arbitrators, the district court, and the court of appeals (the last two twice each) -- the court held that the

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[12] This was the unnumbered paragraph of the Georgia Vegetable-Manprosa Agreement that was expressly limited to the handling of complaints from persons dissatisfied with the quality of the onions shipped.

[13] Indeed, at the arbitration hearing, Respondent loudly insisted that it was at all relevant times the owner of the vegetables that were not shipped because of Petitioner's breach. There was nothing in the record of the arbitration to suggest that the relationship between Respondent and its supplier was other than that of arms-length buyer and seller.

arbitrators' decision was "'rationally inferable' from the purpose and language of the contract between Georgia Vegetable and Dole and was, therefore, within the scope of its powers." App. 43a, citing *Anderman/Smith Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1218-19 and n. 3 (5th Cir. 1990).

But that conclusion does not address the inconsistency between the panel's conclusion and the decisions of this Court[14] and the courts of appeals cited above, all of which stand for the proposition that arbitrators may not enter awards in favor of entities not parties to the contracts establishing their authority, or to the proceedings conducted before them. It was, surely, "rationally inferable" that the arbitrators in *Del E. Webb* or *NCR* would make an award in favor of or against a non-party involved in the underlying transactions. But that was not the point. Arbitrators may make awards only to parties. A contrary result cannot be reconciled with the decisions of the courts of appeals in those cases, or with the teachings of this Court in such cases as *First Options of Chicago*.

There would seem no reason in principle why a contracting party, acting openly as an agent for another, would not be entitled to arbitrate on its principal's behalf, just as it is entitled to assert any of its other contract rights. But there was no contract under which Georgia Vegetable was constituted as Manprosa's agent for this purpose. And whenever Respondent attempted to persuade an adjudicator that such an agency existed, it failed to do so, except on the one occasion (before the Fifth Circuit) in which it was able to conceal the document that revealed the truth.

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[14] The parties to the Service Contract did not agree to arbitrate the question of who was bound by that Contract, just as the Kaplans did not agree to arbitrate the question of arbitrability in *First Options of Chicago*, 115 S. Ct. at 1924.

The remand from the court of appeals to the trial court directed the latter to review the language of the Marketing Agreement between Manprosa and Georgia Vegetable, and to determine from that document whether there was in fact the kind of relationship Respondent was alleging.[15] The court in Mississippi did as directed. It observed the instruction from the court of appeals that the arbitrators' interpretation of the Agreement was entitled to no special deference. The court then correctly held that nothing in the Manprosa-Georgia Vegetable Agreement -- a contract never even seen by Petitioner until the day of the arbitration hearing -- gave Respondent the power to arbitrate disputes with its carrier on behalf of its supplier.

That should have been the end of the matter.[16] In the absence of an agency relationship, Georgia Vegetable and

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[15] The remand was not for the purpose of wasting the time of the court of appeals or of the district court. It was not for the futile review of a document ultimately irrelevant to the issues before it. Rather, the court of appeals correctly found that the outcome of this case turns on a specific and limited issue: whether the Marketing Agreement between Manprosa and Georgia Vegetable made the latter the agent of the former for the purpose of entering an arbitration agreement with Dole. If the Agreement between them did have that effect, then there was privity between Dole and Manprosa, and the *Delta Queen* principle is respected. But if it did not, then there was no privity, and the result is inconsistent with established law.

[16] After directing the district court that it had discretion in interpreting the Georgia Vegetable-Manprosa Agreement, and need not defer to the arbitrators' construction of it, the court below concluded that, "[b]ecause the district court erred in its construction of the Marketing Agreement as inconsistent with the arbitrators' decision, the court exceeded the scope of remand in addressing this issue. *See Burroughs v. FFP Operating Partners*, 70 F.3d 31, 33 (5th Cir. 1996)." App. 44a. Aside from contradicting its own instruction to Judge Russell, the court ignored the fact that the Judge found no "inconsistency": his conclusion was only that the Agreement did not make Respondent Manprosa's agent.

Manprosa are simply different entities,[17] and the contractual authority of one vis-a-vis a third party confers no rights and imposes no obligations upon the other. Especially, it does not confer the right to arbitrate on the other's behalf, given, as this Court has handed down, that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration." *First Options of Chicago*, 115 S. Ct. 1920, 1924.

The decision of the Fifth Circuit was inconsistent with that teaching. For these reasons, it should be reviewed and reversed by this Court.

II. ARBITRATORS ARE PRESUMPTIVELY BOUND BY CONTRACTUAL LIMITATIONS ON DAMAGES UNLESS THOSE PROVISIONS ARE DETERMINED TO BE OPPRESSIVE, UNFAIR, OR OTHERWISE INVALID

The court of appeals appeared, in its first consideration of this case below, to hold that the arbitrators in this matter were bound by the parties' contractual agreement to limit damages to a set amount -- here, $500 per occurrence of a breach by **either** side -- only if that figure represented a "reasonable "pre-estimation" of actual damages to be suffered by the non-breaching party. That is, the arbitrators would be bound by a contractual agreement for liquidated damages just as and to the extent that a court

App. 33a-35a.

[17] In fact, on this record it appears as if they are entities with frequently adverse interests: one is seller, the other buyer, of produce in Nicaragua, and the contract between them is hardly one creating a partnership, joint venture, or other form of cooperation.

would be. App. 23a, citing *Varner v. Varner*, 666 So.2d 493, 396 (Miss. 1995); *Board of Trustees of State Institutions of Higher Learning v. Johnson*, 507 So.2d 887, 890 (Miss. 1987)

But as a matter of logic, amply supported by the caselaw, the requisite determination of "reasonableness" presupposes that the fact-finder has two accurate elements to compare: the estimated damages, and the actual injury. The arbitrators here compared the liquidated damages, $31,000, with what they expressly took to be the actual damages suffered by Georgia Vegetable and Manprosa **added together**. If, as Dole contends, and as the district court below held, the Marketing Agreement did not confer upon Georgia Vegetable the right to claim through arbitration a remedy that belongs to Manprosa, then it follows that the determination of whether the liquidated damages provision of the Service Contract "was a reasonable pre-estimate of damages," App. 23a, was based on an erroneous premise. The arbitrators, after all, did **not** determine that liquidated damages of $500 per incident were or were not unreasonable compared to Georgia Vegetable's **own** loss: they expressly made that decision by comparing the liquidated damages clause with **the combined injuries of Georgia Vegetable and Manprosa**.

There is nothing contentious in this proposition: this is exactly what the arbitrators themselves said they were doing. The arbitrators concluded that "[t]he $500.00 per container provision in no way meets the requirement of just and reasonable compensation for the loss of approximately **$10,728 per container not shipped**." App. 6a, emphasis added. The figure used for comparison -- $10,728 -- was the sum of the commissions allegedly lost by Respondent on its own account ($1,846.88 per container), and the net price to be paid to Manprosa ($8,880.75 per container). The ratio of

the agreed amount to those actual damages (*i.e.*, $500:$10,728) is approximately 1:21.5. The arbitrators made **no** determination of whether $500 per occurrence was a reasonable estimate of Georgia Vegetable's damages of $1,846.88, a ratio of about 1:3.7. In other words, they did **not** perform the comparison that the court of appeals in reinstating their award held was their responsibility if they were to oust the agreement that the parties actually made: they did **not** apply Mississippi law to determine whether the liquidated damages provision was "a reasonable pre-estimation of [actual] damages," App. 23a (citations omitted), because they misapprehended what "actual damages" to take into account.[18]

The arbitrators and the court of appeals below offer nothing in support of the view that $500 was an unreasonable pre-estimate of damages that, in the end, amounted to less than $1,850. Petitioner would respectfully point out that while the liquidated damages stood in a ratio of 1:3.7 (approximately 27%) to the injury actually suffered by Georgia Vegetable, Dole itself would have been reimbursed only one seventh (1:7, or 14%) of its maximum actual loss had Georgia Vegetable breached the Service Contract by not presenting cargo for transportation. That is, Dole was to have received $500 for each instance of the shipper's breach, while its lost revenue, or actual damages, could have been as high as the agreed contract price of $3,500.[19] The reciprocal

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[18] The "reasonableness" of the estimate is to be established according to what might have been known at the time of contracting, not the time that the contract was actually breached. *See, e.g., Superfos Investments Ltd. v. Firstmiss Fertilizer, Inc.*, 821 F. Supp. 432, 440 (S.D. Miss. 1993). Actual damages could not be anticipated with certainty when the contract was signed: that is why the parties agreed, as part of their bargain, and bought and paid for, a liquidated damages provision.

[19] Dole's actual damages could have been less, were it able to

provision in the Service Contract, therefore, was harsher in its potential treatment of Dole than of Georgia Vegetable in the event that its liquidated damages clause needed to be invoked.

In any event, however, there was no consideration given by the arbitrators as to whether the liquidated damages clause was a reasonable pre-estimation of the injury suffered by a party to the contract and to the arbitration, since the panel assumed -- incorrectly, for the reasons expounded in Section I of this Petition -- that it was comparing the liquidated amount with the combined injury suffered by both Respondent and its supplier. If Petitioner is correct in its argument in Section I, if it was improper for the arbitrators to consider Manprosa's losses, and their award to that extent exceeded their authority and was reversible for that reason under 9 U.S.C. § 10(a)(4), then the arbitrators' discarding of the liquidated damages clause was also incorrect for the same reason: it came about as a direct logical consequence of the award to a non-party.

The liquidated damages provision of the contract between Petitioner and Respondent was bought and paid for: it was part of the consideration that both sides brought to their agreement. To be sure, there are bases for adjudicators to set aside such agreements,[20] but they are presumptively valid, and the arbitrators gave no persuasive reason for ignoring the parties' express agreement in this case. Rather,

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mitigate by locating another shipper.

[20] For example, courts are not obligated to enforce liquidated damages clauses that are punitive in intent or in effect, or which act "only as an added spur to performance" of the contract. *Priebe & Sons v. United States*, 332 U.S. 407, 413 (1947). Obviously, there is no punitive element here: the arbitrators' apparent objection to the liquidated damages of $500 per occurrence was that the figure was too low, not too high.

in ignoring the parties' express, contractual, and mutual undertaking, the court below compounded the error it made in ignoring the teachings of this Court and in deviating from the law as established in the other circuits, by making an arbitral award to an entity not party to the arbitration contract. For these reasons too, therefore, this Court should review and set aside the decision of the Fifth Circuit below.

CONCLUSION

Wherefore, Petitioner Dole Ocean Liner Express respectfully prays that its Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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Counsel for Petitioner
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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60885
Summary Calendar

DOLE OCEAN LINER EXPRESS,

Plaintiff-Appellee,

versus

GEORGIA VEGETABLE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:95-CV-407RG

Before JONES, SMITH, and STEWART, Circuit Judges
PER CURIAM:[35]

Georgia Vegetable Company, Inc. (Georgia Vegetable) appeals the decision of the district court granting summary judgment in favor of Dole Ocean Liner Express (Dole). In *Dole Ocean Liner Exp. v. Georgia Vegetable Co.*,

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[35] Pursuant to 5th Cir. R. 47.5 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

93 F.3d 166 (5th Cir. 1996) (*Dole II*) we remanded the case to the district court to interpret the Marketing Agreement between Georgia Vegetable and Manprosa of Nicaragua and to determine whether the decision of a panel of The Society of Maritime Arbitrators of the New Orleans Board of Trade was correct as a matter of law.

After reviewing the briefs and the record *de novo*, we conclude that the decision of the district court granting Dole's motion for summary judgment was error. It is undisputed that Dole solicited Manprosa's business, Manprosa introduced Dole to Georgia Vegetable, and Manprosa delegated authority to negotiate carriage to Georgia Vegetable. Dole refused to permit Manprosa to become a signatory to the Service Contract between Dole and Georgia Vegetable because of previous difficulties with Nicaraguan shippers. The arbitration panel held a hearing and considered the Marketing Agreement between Georgia Vegetable and Manprosa, as well as testimony concerning Dole's knowledge of the business relationship between Georgia Vegetable and Manprosa. The arbitrators determined that Dole should have been aware that Georgia Vegetable would seek to enforce the Service Contract on behalf of Manprosa. The arbitration panel's decision is "rationally inferable" from the purpose and language of the contract between Georgia Vegetable and Dole and was, therefore, within the scope of its powers. *See Anderman/Smith Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1218-19 & n. 3 (5th Cir. 1990).

We do not revisit the arbitration panel's damage award to Georgia Vegetable. In *Dole Ocean Liner Exp. v. Georgia Vegetable Co.*, 84 F.3d 772, 774 (5th Cir. 1996) (*Dole I*), we held that the arbitration panel did not exceed its

power in finding, as a matter of law, that the liquidated-damages clause of the contract between Georgia Vegetable and Dole was void and in fashioning the damage award to Georgia Vegetable. Because the district court erred in its construction of the Marketing Agreement as inconsistent with the arbitrators' decision, the court exceeded the scope of remand in addressing this issue. *See Burroughs v. FFP Operating Partners*, 70 F.3d 31, 33 (5th Cir. 1996).

Accordingly, the judgment of the district court is VACATED and the cause is REMANDED to that court to reinstate the arbitration panel award.

VACATE AND REMAND.

Filed: January 8, 1998

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In the Matter of Arbitration

-between-

Georgia Vegetable Company

-and-

Dole Ocean Liner Express

DECISION AND FINAL AWARD

S.M.A. CASE 95.1

BEFORE:
Panel of Arbitrators
H.G. Joffray, *Chairman*
W.J. Amoss, *Arbitrator*
R. Rugan, *Arbitrator*

APPEARANCES:
For Georgia Vegetable Company
Hopkins, Dodson, Crawley
Bagwell, Upshaw & Persons
By: K. Douglas Lee, Atty.

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Timothy D. Crawley, Atty.

For Dole Ocean Liner-Express
Terriberry, Carroll & Yancey, L.L.P.
By: Gary A. Hemphill
Cynthia Anne Wegmann

WITNESSES:
For Georgia Vegetable Company
Robert Grist, *President*
Maria Mansell, *Executive Assistant,* Manprosa
For Dole Ocean Liner Express
August M. Lopes, *General Manager*

DESCRIPTION

This arbitration concerns dispute under the service contract dated Jan. 1, 1994 between Georgia Vegetable Company (hereinafter referred to as *shipper*) and Dole Ocean Liner Express (hereinafter referred to as *carrier*) for the carriage of refrigerated containers of onions from Nicaragua to U.S. destinations.

PROCEEDINGS

Each of the parties submitted arbitration agreements and the panel arranged for a hearing on May 17, 1995 at Gulfport, Mississippi. Voluminous documentary evidence was introduced and witnesses appeared and testified under

oath. Lengthy testimony and interrogation of witnesses ensued and recorded in transcripts by certified recorder. In addition to interrogation of witnesses by counsel for the parties, members of the panel queried witnesses with the objective of clarifying the record. Hearing closed May 17, 1995 and counsel for both parties submitted arguments through final briefs.

BACKGROUND

During early 1993, discussions and correspondences were exchanged between both parties as to a year contract for the offer for shipment of a minimum of 125 x 40' containers of shipper's cargo from Managua, Nicaragua.

Terms were agreed upon and contract became effective Jan. 1, 1994 for a period of 6 months and committed to the aforesaid minimum of container movements and a conditional maximum of 30 containers per weekly voyage during the shipping season of approximately 10-12 weeks. The contract rate was $3500.00 per 40' container from point of origin to point of destination. Liquidated damages and default provisions were set at $500 per container in the event a.) carrier failed to transport containers during the term of the contract and b.) shipper's failure to tender for transportation at least 125 containers during the term of the contract.

As signatory to the contract, shipper acted as agent and produce owner, in concert with Manprosa (referred to as grower) relative to performance and compliance with terms

and conditions of the contract. An agent, when so empowered, acts in his own name when pursuing damages in behalf of the principal. Georgia Vegetable Company was so empowered in their agreement with Manprosa as follows:

> "The receivers shall have the right and responsibility to handle any type of litigation or take any other action related to said onions should the need arise. All of this shall be handled at the sole discretion and according to the best judgment of Georgia Vegetable Company, which may handle such matters in its own name just as if it were owners of said onions"

This unusually broad and extensive authorization warrants the claims, including the losses suffered by Manprosa. In direct testimony, Manprosa further confirmed the authorization.

Carrier solicited of Manprosa the carriage of the onions. Manprosa introduced carrier to Georgia Vegetable Company explaining they had delegated to Georgia Vegetable Company the authority to negotiate the ocean carriage. Carrier refused to permit Manprosa becoming a signatory to the service contract based on previous difficulties with Nicaraguan shippers.

Subsequent to contract date, shipper requested 39 containers during Feb. sailings, and carrier provided and

transported only 12 containers. Additionally, shipper requested 131 containers for carrier's month of March departures, and carrier provided none for this period. Alternatively, shipper sought and successfully arranged for carriage of 96 containers by other carriers (i.e. Tropical, Sea Land, etc.) during this period. Shipper was unable to obtain 62 containers of the 170 requested of carrier. The efforts of Manprosa to reduce the damages by obtaining other shipping opportunities is well documented and uncontested by carrier.

Carrier had indicated that his inability to provide and transport containers for shipper was due to a fire aboard vessel that was bringing in containers from Livorno, Italy to be dedicated to this service. Carriers Nicaraguan agent "TRAPORT" subsequently advised shipper on 2/14/94 that the container shortage was temporary and that equipment would be available within the week. This did not occur and carrier did not provide or transport any additional containers for shipper.

On March 13, 1995 shipper demanded damages from carrier for non-performance of contract in the amount:

1. Expectancy damages	$2,348,656.00
2. Container repair damage	$2,500.00
3. Unpaid liquidation damage (80 containers)	$40,000.00
TOTAL	$2,391,156.00

Prior to this claim, carrier paid shipper $46,500 liquidated damages on 93 containers, shipped via other carriers, and claimed shipper owed carrier $14,000 for unpaid freight on 4 shipments. Carrier also responded that

their responsibility was limited to liquidated damage amounts and subsequently both parties initiated procedures for arbitration of the dispute in accordance with the provisions of their service contract.

Both parties' briefs were submitted to the panel of arbitrators and an official hearing was conducted in Gulfport, Miss. on May 17, 1995.

DISCUSSION AND DECISION

Faced with a rather severe container shortage, it would appear that carrier made the business decision to maximize the utilization of the available containers by restricting their dispersal to other countries, i.e., Nicaragua. This policy worked successfully for their ships operated at very close to maximum capacity, principally with carrier's proprietary cargo. Carrier, after initial shipments, abandoned their contractual obligations to shipper without sufficient or adequate notification and having aborted by abandonment the contract, the carrier cannot seek protection under it.

The liquidated damage provision served its purpose, as intended, to cover the additional expenses incurred on the containers shipped via other carriers at higher expense. The $500.00 per container provision in no way meets the requirements of just and reasonable compensation for the loss of approximately $10,728 per container not shipped on account of abandonment of the contractual obligations to carry this perishable commodity. It has been established that

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carriers may not limit liability when possible causes could reasonably be known to them.

AWARD

As per testimony at the hearing it was developed that the actual number of containers called for from carrier was one hundred seventy (170). Further testimony indicated ninety six (96) containers were shipped by other lines and twelve (12) by carrier for a total of one hundred eight 108).

After extensive review and analysis of invoices and documents reflecting the revenue and expenses of the containers transported by carrier and others, the average gross sales revenue per container was $15,510.88. Handling and freight costs were $4783.25 per container and commission of per $1846.66 per unit.

Based on 62 containers in default as a result of contract abandonment by Dole Ocean Liner Express we do hereby award, effective July 5, 1995, to Georgia Vegetable Company, the amount of $1846.88 per container. We also award to Georgia Vegetable Company, as marketing manager for and in behalf of Manprosa, the amount of $8880.75 per container, for a sum of $10,727.63 per container, or total award of $651,113.06. This amount reflects a reduction of $14,000 unpaid freight due carrier, and all other claims by Georgia Vegetable Company are denied account of failure to comply with time restrictions.

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AWARD CALCULATION

Net of $8890.75 per container due Manprosa on 62 containers $550,606.50

Georgia Vegetable Company commission of $1846.88 per container due on 62 containers $114,506.56

TOTAL $665,113.06

Less $14,000 freight due Dole Ocean Liner Express -$14,000

Net due Georgia Vegetable Company and Manprosa $651,113.06

If the above sum remains outstanding 30 days from the date of this award, interest is to accrue at the rate of 10% per annum from the date of this award until paid.

The award may be entered for judgment in a court of competent jurisdiction in accordance with the provisions of the U.S. Arbitration Act 9, USC, Sec. 1.

Attorney fees to be borne by each party, interpreter fee for account of Georgia Vegetable Company, and all other expenses, including arbitrator fees, to be equally shared by Dole Ocean Liner Express and Georgia Vegetable Company.

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In witness to this, our final award, we here below set our signatures.

/s/
Henry G. Joffray

/s/
W. James Amoss

/s/
Ralph Rugan

New Orleans, Louisiana

06/30/95

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
Southern Division

DOLE OCEAN LINER EXPRESS,
Petitioner,

v. **Civil Action No. 1:95-CV-407RR**

GEORGIA VEGETABLE CO., INC.,
Respondent.

MEMORANDUM ORDER

This case involves a contract dispute between the Petitioner, Dole Ocean Liner Express, and the Respondent, Georgia Vegetable Company. The parties attempted to resolve their dispute through arbitration; however, their attempt proved unsuccessful. Dole now asks that the damages awarded to Georgia Vegetable by the arbitration panel be vacated or, in the alternative, modified.

The Contract

In 1993, Dole Ocean Liner Express and Georgia Vegetable Company formed a contract. Pursuant to this contract, Dole agreed to supply Georgia Vegetable with 40-foot containers for the latter's "use in quantities sufficient" to transport vegetables from Nicaragua to the United States on Dole's ships. See Service Contract at sec. 6.1. Georgia Vegetable agreed to "tender to [Dole] not less than 125 X 40' foot containers loaded with [vegetables] for transportation on [Dole's] vessel from ... Nicaragua to [the United States]." *See id.* sec. 4.1. The contract obligated

Georgia Vegetable to pay a "base rate" of $3,500 for each container used in the shipment of its vegetables. *Id.* sec. 5.

The contract delineated Georgia Vegetable's remedy in the event of a "default" by Dole:

> In the event that Carrier (Dole) shall fail to transport containers duly tendered by Shipper [Georgia Vegetable] pursuant to this Contract, to the extent Shipper must and does transport such containers on alternative ocean carrier's vessels, Carrier shall pay to Shipper a sum equal to the amount such alternative carrier's rates exceed the Base Rates of Carrier; provided however that such sum shall in no event exceed $500.00 per container. In the event that Shipper, after due diligence, is unable to ship on an alternative carrier, then providing Shipper exercised due diligence to locate and ship on an alternative carrier, Carrier shall pay to Shipper US$500.00 for each container not shipped by Carrier after duly tendered by Shipper.

Id. sec. 7.2. Conversely, in the event of a "default" by Georgia Vegetable -- *i.e.*, failure to "tender for transportation at least 125 containers during the term of [the] Contract" -- the contract provided that Dole would be entitled to $500 per container "below such number." *Id.* sec. 7.1.

Finally, the contract called for arbitration of "any dispute, controversy or claim, arising out of or relating to [it] or a breach thereof" and application of the "procedural and substantive laws of the Maritime Law of the United States and . . . the State of Mississippi." *Id.* secs. 14.3 & 14.4. The parties selected the Society of Maritime Arbitrators of the

New Orleans Board of Trade to "administer the arbitration and act as appointing authority." *Id.* sec. 14.4.

The Breach

No one disputes that Dole breached the contract "by falling to provide containers in a regular and timely fashion." See Dole's Memorandum of Points and Authorities at 2. Upon breach, Georgia Vegetable demanded arbitration -- subsequently held on May 17, 1995, at the U.S. District Court in Biloxi, Mississippi. Represented by counsel, the parties called witnesses and introduced documentation. At the conclusion of the proceedings, the panel of arbitrators reserved judgment until June 30, 1995, at which time it announced its decision.

The Arbitration Panel's Decision

On June 30, 1995, the arbitration panel concluded that Dole had failed to supply Georgia Vegetable with 62 of the requested 170 containers for a shipment of onions from Nicaragua. The panel then awarded Georgia Vegetable $114,506.56 ($1,846.88 x 62) for loss of commissions. The panel also awarded Georgia Vegetable's Nicaraguan supplier, Samuel Mansell Productos No Tradicionales, S.A. ("Manprosa"), $550,606.50 ($8,890.75 x 62) for loss of net payments due for the supply of onions.[1]

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[1] The Panel displayed its calculation accordingly:

Net of $8,890.75 per container due Manprosa on 62 containers	$550,606.50
Georgia Vegetable Company commission of $1,846.88 per container due on 62 containers	$114,506.56
TOTAL	$665,113.06
Less $14,000 freight due Dole Ocean Liner Express	-$14,000.00

Dole's Motion and Georgia Vegetable's Response

On August 23, 1995, Dole filed an Amended Motion to Vacate, or, in the Alternative, to Modify, an Arbitral Award. "As grounds for [its] Amended Motion," Dole contends that, "in entering the Award, the arbitrators exceeded their . . . authority by:

> 1. openly ignoring a provision of the underlying contract establishing an agreed measure of liquidated damages in the event of a breach by Dole, the very event that occurred in this case;
>
> 2. purporting to make an award against Dole and in favor of a third party, "Manprosa," although Manprosa was not a party to any agreement to arbitrate, and indeed was not in privity of contract with Dole at all; and
>
> 3. professing to apply a measure of damages that is inapposite as a matter of law in contract cases, being a measure of damages in tort, and therefore not relevant to the case at Bar.

Dole's Amended Motion to Vacate at 2-3.

Georgia Vegetable counters that the arbitration panel "interpreted the contract against Dole, and found that Dole owed damages under this contract" in the amount of $651,113.06. *See* Georgia Vegetable's Response at 16.

Net due Georgia Vegetable Company and Manprosa
$651,113.06

See In the Matter of Arbitration between Georgia Vegetable Co. v. Dole Ocean Liner Express, S.M.A. case 95.1, at 7 (June 30, 1995).

Georgia Vegetable adds that "[h]aving thus interpreted the contract, the correctness of the interpretation is not open for question . . . [and] the motion to vacate must be denied." *Id.*

Jurisdiction

This Court's jurisdiction is based on 9 U.S.C. sec. 10(a)(4), which provides that "[i]n any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . [w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

This Court's jurisdiction is also based on diversity of citizenship and that amount in controversy (which exceeds $50,000). *See* 28 U.S.C. sec. 1332.[2]

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[2] Georgia Vegetable asserted, somewhat half-heartedly, that this Court has no jurisdiction whatsoever to review Dole's Motion because the contract provides that the "award of the arbitrators . . . shall be final and binding upon the parties, and neither party shall appeal the award to any court." *See* Georgia Vegetable's Response at 3 (citing Service Contract sec. 14.4). "This is basis enough," Georgia vegetable suggests, "to dismiss Dole's . . . Motion . . ." *Id.* at 3-4.

This Court is unpersuaded by Georgia Vegetable's assertion. At most, this contractual provision restricts -- rather than annihilates -- this Court's authority to review the arbitration panel's decision. *See e.g. Iran Aircraft Industries v. AVCO Corp.*, 980 F.2d 141, 145 (2d Cir. 1992) ("The terms 'final' and 'binding' merely reflect a contractual intent that the issues joined and resolved in the arbitration may not be tried de novo in any court.") (citing *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d. 424, 427 (2d Cir. 1974)) ; *Gramling v. Food Machinery & Chemical Corp.*, 151 F. Supp. 853, 855 (W.D.S.C. 1957) (where arbitration contract provides that award shall be binding on parties without any right of appeal, motion to vacate or modify is only remedy); *see also Brotherhood of R.R. Trainmen v. Central of Ga. Ry. Co.*, 415 F.2d 403, 413 (5th Cir. 1969) ("finality is a mirage if relied upon to preclude any judicial review of an arbitration award or administrative agency's decision"), *cert. denied*, 396 U.S. 1008 (1970); 1 *Domke On Commercial Arbitration*, sec. 33.01 ("The right to an appeal from an

Standard of Review

"Judicial review or arbitration awards is extremely limited." *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989) (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987), *cert. denied*, 498 U.S. 853 (1990). "Where an arbitrator exceeds his contractual authority, vacation or modification of the award is the appropriate remedy." *Id.* (citing *Containers Prods., Inc. v. United Steelworkers of America*, 873 F.2d 818, 820 (5th Cir. 1989)); *see also Teamsters Local Union 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 905 (5th Cir. 1984) ("Arbitration agreements do not grant arbitrators carte blanche, so federal courts have the power to vacate awards . . . [where] plain and unambiguous provisions of the agreement" were "disregard[ed]" or "modif[ied]") (citing *International Ass'n of Machinists and Aerospace Workers, Dist. No. 145 v. Modern Air Transport, Inc.*, 495 F. 2d 1241, 1244 (5th Cir. 1974)); 9 U.S.C. sec. 10(a)(4) (district court may vacate award where arbitrator exceeds authority).

In sum, "an arbitrator's decision is accorded considerable judicial deference . . ." *Delta Queen Steamboat, Inc.*, 889 F.2d at 602 (citing *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960)). "However, where the arbitrator exceeds the express limitations of his contractual mandate, judicial deference is at an end." *Id.*

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award, though restricted in the statutory law of many states, may not be waived by stipulation of the parties.").

Finally, Georgia Vegetable seems to have abandoned this argument; it wholly failed to assert it during the hearing this Court held on November 15, 1995.

Discussion

In the case sub judice, Georgia Vegetable agreed to compensate Dole in the amount of $500 per container in the event Georgia Vegetable breached its contractual obligation. See Service Contract at sec. 7.1. Conversely, Dole agreed to compensate Georgia Vegetable in the maximum amount of $500 per container in the event Dole breaches its contractual obligation. *See id.* sec. 7.2.

Dole admits that it breached its contractual obligation. The arbitration panel agreed and found that Dole had failed to supply Georgia Vegetable with 62 of the requested 170 containers for a shipment of onions from Nicaragua. However, the panel exceeded "the express limitation of [the] contractual mandate" by awarding $10,727.63 per container for a total of $665,113.06 -- rather than $500 per container for a total of $31,000 (less $14,000 in undisputed unpaid freight).[3] *See Delta Queen Steamboat, Inc.*, 889 F.2d at 604 ("[T]he rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral

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[3] At one point, Georgia Vegetable suggests that the provision in the Service Contract, which limits the amount of liquidated damages to $500 per container in the event of breach by Dole, "was not present at the time it was initially reviewed by Georgia Vegetable, and was ad ed later by Dole without Georgia Vegetable's actual knowledge or agreement." *See* Georgia Vegetable's Response at 14.

This suggestion, which Georgia Vegetable declined to pursue at the hearing held on November 15, 1995, is frivolous at best and wholly devoid of evidentiary support at worst. The arbitration panel did not find any evidence of fraud. Indeed, under cross-examination during the arbitration proceedings, Robert Grist, president of Georgia Vegetable, conceded: "I guess I was stupid for not having a lawyer to read that [i.e., the $500-per-container limitation]. I did not have my lawyer in Tifton, Georgia to even go over that. I read that, so I . . . didn't understand that, that way." *See* Arbitration Proceedings Transcript at 53, *In the Matter of Arbitration between Georgia Vegetable Co. v. Dole Ocean Liner Express*, S.M.A. case 95.1 (June 30, 1995).

action contrary to express contractual provisions will not be respected.").

The panel also exceeded its authority by directing Dole to pay $550,606.50 to Manprosa, a non-party to both the contract and arbitration. Indeed, no one disputes that "Dole has never agreed, by word or deed, to arbitrate any dispute it might have with Manprosa, with whom it was not even in privity." *See* Dole's Memorandum of Points and Authorities at 12. "[A]rbitration is a matter of consent; 'it will not be imposed on parties beyond the scope of their agreement.'"[4] *U.S. Postal Serv. v. National Rural Letter Carriers Ass'n,* 959 F.2d 283, 287 (D.C. Cir. 1993) (quoting *Litton Financial Printing Div. v. National Labor Relations Bd.,* 111 S.Ct. 2215, 2222 (1991)); *accord Neal v. Hardee's Food Systems, Inc.,* 918 F.2d 34, 37 (5th Cir. 1990) ("A party cannot be compelled to submit a dispute to arbitration unless there has been a contractual agreement to do so.") (citing *Matter of Talbott Big Foot, Inc.,* 887 F.2d 611, 614 (5th Cir. 1989)).

Conclusion

Without question, the arbitration panel exceeded its contractual authority. Accordingly, vacation of the award is the necessary remedy. *Delta Queen Steamboat Co. v. District Marine Eng'rs Beneficial Ass'n,* 889 F.2d 599, 602 (5th Cir. 1989) (citing *Containers Prods., Inc. v. United Steelworkers of America,* 873 F.2d 818, 820 (5th Cir. 1989)); *see also* 9 U.S.C. sec. 10(a)(4). The award shall therefore be reduced to $17,000 -- representing the number of containers with which Dole failed to supply Georgia Vegetable,

[4] Even assuming *arguendo* the panel was authorized to direct Dole to compensate Manprosa, the panel nonetheless should have restricted itself to the contractual amount of $500 per container.

multiplied by the contractual liquidated damages amount of $500, less $14,000 in unpaid freight.

IT IS THEREFORE ORDERED AND ADJUDGED that the Petitioner's Amended Motion to Modify be hereby **GRANTED** to the extent discussed above, and the Amended Motion to Vacate **DENIED**.

SO ORDERED AND ADJUDGED this the 22nd day of November, 1995.

/s/

Dan M. Russell
UNITED STATES DISTRICT JUDGE

DOLE OCEAN LINER EXPRESS,
Plaintiff-Appellee,

v.

GEORGIA VEGETABLE COMPANY,
Defendant-Appellant.

No. 95-60780
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 6, 1996.

Appeal from the United States District Court for the Southern District of Mississippi.

Before REAVLEY, SMITH and DeMOSS, Circuit Judges.

REAVLEY, Circuit Judge:

This is an a appeal of a district court's reversal of an arbitration panel's decision. There is no question that Dole breached its contract with Georgia Vegetable. Pursuant to that contract, Georgia Vegetable requested arbitration of its loss. The arbitration panel awarded Georgia Vegetable damages in excess of the amount provided for in the liquidated damages clause in the contract. The district court found that the arbitration panel exceeded its authority under the contract and reversed the arbitration panel decision. The court reduced the damages to an amount equal to the liquidated damages provision. Believing that the arbitration

panel did not exceed its authority to interpret the contract, we reverse the district court.

Dole agreed to provide Georgia Vegetable with 40 foot containers and to transport those containers. Georgia Vegetable was the marketing manager for Manprosa, a Nicaraguan company. Manprosa owned the onions being shipped and Georgia Vegetable received commissions for the sale of the onions in America. The perishable goods were to be transported aboard Dole's vessels from a port in Nicaragua to America. The contract provided for a minimum number of containers and a price per container. Georgia Vegetable contracted for a total of 170 containers from Dole. Dole shipped only 12. Through another carrier Georgia Vegetable was able to arrange the shipment of 96 containers.[5] However, despite Georgia Vegetable's best effort, 62 containers of onions were never shipped, and the goods perished at the port.

Georgia Vegetable invoked the arbitration clause of the contract and sought recovery of its expectancy damages for Dole's breach.[6] The arbitration panel threw out the liquidated damages clause and awarded Georgia Vegetable $114,506.56, the value of its lost commissions, and awarded Manprosa $550,606.50 for its loss.[7] The basis for the arbitration panel's decision was as follows,

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[5] The parties have settled the claim on 93 of the containers shipped on other carriers pursuant to the liquidated damages clause of the contract. Dole paid $46,500, the maximum permitted under the contract.

[6] The arbitration clause of the contract, section 14.4, provides in pertinent part that, "[a]ny dispute, controversy or claim, arising out of or relating to this Contract or a breach thereof, shall be finally resolved by arbitration."

[7] The total amount awarded was reduced by $14,000 due Dole for unpaid freight.

> Faced with a rather severe container shortage, it would appear that Dole made the business decision to maximize the utilization of the available containers by restricting their dispersal to other countries, i.e., Nicaragua. This policy worked successfully for their ships operated at very close to maximum capacity, principally with [Dole's] proprietary cargo. [Dole,] after initial shipments, abandoned their contractual obligations to [Georgia Vegetable] without sufficient or adequate notification and having aborted by abandonment the contract, [Dole] cannot seek protection under it.
>
> The liquidated damages provision served its purpose, as intended, to cover the additional expenses incurred on the containers shipped via other carriers at higher expense. The $500.00 per container provision in no way meets the requirements of just and reasonable compensation for the lost of approximately $10,728 per container not shipped on account of abandonment of the contractual obligations to carry this perishable commodity. It has been established that carriers may not limit liability when possible causes could reasonable known to them.

The district court reversed the arbitration panel's decision because it "exceeded 'the express limitations of [the] contractual mandate' by awarding $10,727.63 per container for a total of $665,113.06 -- rather than $500 per container for a total of $31,000 (less $14,000 in undisputed unpaid freight)." Dist Ct. Memorandum Order p. 7.[8]

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[8] The liquidated damages provision, section 7.2 of the contract, provided,

> In the event that [Dole] shall fail to transport containers duly

We review the district court's decision de novo. Our review of the arbitrator's award itself is very deferential, and we should set aside that decision only in narrow circumstances.[9] As we said in *Gateway Technologies*, the award "shall not be vacated unless: (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers."[10] Does argues, and the district court found, that the arbitration panel exceeded its power in awarding damages in excess of the liquidated damages provision in the contract.

The contract provided that the arbitration panel was to interpret the contract in accordance with the "procedural and substantive laws of the Maritime Law of the United States and, to the extent possible, the State of Mississippi."

> tendered by [Georgia Vegetable] pursuant to this Contract, to the extent that [Georgia Vegetable] must and does transport such containers on alternative ocean carrier's vessels, [Dole] shall pay to [Georgia Vegetable] a sum equal to the amount such alternative carrier's rates exceed the Base Rates of [Dole]; provided however that such sum shall in no event exceed $500.00 per container. In the event that [Georgia Vegetable,] after due diligence, is unable to ship on an alternative carrier, then providing [Georgia Vegetable] exercised due diligence to locate and ship on an alternative carrier, [Dole] shall pay to [Georgia Vegetable] US$500.00 for each container not shipped by [Dole] after duly tendered by [Georgia Vegetable].

[9] *First Options of Chicago, Inc. v. Kaplan* ___ U.S., ___, ___, 115 S. Ct. 1920, 1923, 131 L. Ed.2d 985 (1995).

[10] *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d. 993, 996 (5th Cir. 1995); 9 U.S.C. § 10(a).

The determination of whether a liquidated damages clause is enforceable is made by application of a legal standard to the evidence.[11] In Mississippi, liquidated damages provisions are not enforceable if they are not a reasonable pre-estimation of damages.[12] The arbitration panel determined that the $500.00 per container liquidated damage provision "in no way meets the requirements of just and reasonable compensation for the loss. . ."[13]

Whatever our belief about the enforceability of the liquidated damages clause may be, it is clear that the arbitration panel had the power to determine that it was not a reasonable pre-estimate of damages and therefore void.[14] Because the determination of whether the liquidated damages provision was legally enforceable was left to the arbitration panel under the contract, the arbitration panel did not "exceed their powers" by finding, as a matter of law, that it was void.

Dole believes our opinion in *Delta Queen Steamboat*[15] controls the disposition of this case and requires a different result. In *Delta Queen Steamboat,* we held that

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[11] *See Farmers Export Co. v. M/V Georgia Prois, Etc.*, 799 F.2d 159, 162 (5th Cir. 1986).

[12] *Varner v. Varner*, 666 So.2d 493, 396 (Miss. 1995); *Board of Trustees of State Institutions of Higher Learning v. Johnson*, 507 So.2d 887, 890 (Miss. 1987).

[13] Arbitration Panel op., p. 6.

[14] *See Farmers Export*, 799 F.2d. at 162; *Varner*, 666 So.2d at 496; *Johnson*, 507 So.2d at 890.

[15] *Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n.*, 889 F.2d 599 (5th Cir. 1989), *cert. denied*, 498 U.S. 853, 111 S. Ct. 148, 112 L. Ed. 2d 114 (1990).

"arbitral action contrary to express contractual provisions will not be respected."[16] The arbitrator there lacked authority to order reinstatement of a pilot found to be grossly careless. In this case, however, the arbitration panel had the *legal power* to find the liquidated damages clause void. Once done, there was no contractual provision which the arbitration panel had to follow to determine Georgia Vegetable's loss.[17] The district court's and Dole's reliance on *Delta Queen* was misplaced.

Finally, Dole asserts the arbitration panel exceeded its authority in ordering payment to Manprosa, a third party. As a part of its decision, the arbitration panel awarded a portion of the losses to Manprosa, the grower of the onions in Nicaragua. Dole asserts it has been forced to arbitrate its dispute with Manprosa without any contractual duty to do so. We disagree.

In determining whether the arbitration panel exceeded its jurisdiction, we resolve all doubts in favor of arbitration.[18] There is no question that Georgia Vegetable had the right to seek damages on behalf of Manprosa as its agent.[19] Manprosa *explicitly* authorized Georgia Vegetable

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[16] *Id.*, at 604.

[17] We note, however, that Georgia Vegetable is still limited in its recovery to only damages submitted to the arbitration panel. *Compare Valentine Sugars, Inc. v. Donau Corp.*, 981 F.2d 210, 213 (5th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 3039, 125 L.Ed.2d 725 (1993) (broad arbitration provision permitted resolution of issues presented to arbitrator), and *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979) (where party expressly stated issue was not before arbitrator and other party relied on representation then issue could not be decided by arbitrator).

[18] *Valentine Sugars*, 981 F.2d at 213.

[19] Dole asserts on appeal that the arbitration panel misread the

to handle any type of litigation concerning the onions, "in its own name just as if it were owners of said onions."[20] "A person with whom an agent makes a contract on behalf of a principal is subject to liability in an action brought thereon by the agent in his own name on behalf of the principal if the agent is a party promisee".[21] Furthermore, the contract between Dole and Georgia Vegetable required the arbitration of "[a]ny dispute, controversy or claim, arising out of or relating to [the] contract or a breach thereof..."[22] From Dole's perspective, the two entities were one for purposes of recovering under the contract. Because Georgia Vegetable was free to sue Dole on behalf of Manprosa, we believe it was entitled to also seek arbitration.[23]

Any error which occurred concerned not whether Dole had to pay the damages, but rather to whom the damages should be paid. Because the arbitration was

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applicable contract between Manprosa and Georgia Vegetable. As the agreement is not in the record, we have deferred to the arbitration panel's factual determination of the contract's scope.

[20] Arbitration Panel op. pp. 2-3.

[21] Restatement (Second) of Agency § 364 (1958); *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 258 (5th Cir. 1980); *reh'g denied*, 634 F.2d 1355 (5th Cir. 1980); *Forest Oil Corp. v. Tenneco, Inc.*, 626 F. Supp. 917, 921-22 (S.D. Miss. 1986).

[22] § 14.4 of the Contract.

[23] As evidence that Dole is being forced to arbitrate the case with Manprosa, Dole asserts that it refused to permit Manprosa to be a signatory of the contract. Dole Brief, p. 18 n. 12; Arbitration Panel op. p. 3. However, the mere fact that Dole insisted it deal with Manprosa's agent and not Manprosa does not support such a contention. Dole was aware that Georgia Vegetable was Manprosa's agent, and as such should have been aware that Manprosa's agent would enforce the contract on behalf of the principal.

between Dole and Georgia Vegetable, the entire amount should have been awarded to Georgia Vegetable. For purposes of Dole's agreement with Georgia Vegetable, Georgia Vegetable was the owner of the perishable goods. Dole was not forced to arbitrate a dispute with Manprosa. Dole was only forced to pay an amount due to Georgia Vegetable, and by it to a third party. Because Georgia Vegetable does not complain, we find Dole's argument meritless.

The district court is REVERSED, the cause is REMANDED to that court to reinstate the arbitration panel award.

DOLE OCEAN LINER EXPRESS
Plaintiff-Appellee,

v.

GEORGIA VEGETABLE COMPANY,
Defendant-Appellant.

No. 95-60780
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Aug. 12, 1996.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING

Before REAVLEY, SMITH and DeMOSS, Circuit Judges.

REAVLEY, Circuit Judge:

Dole's motion for rehearing is granted. Our original opinion at 84 F.3d 772 is modified as follows:

The arbitration panel awarded losses to Manprosa, the grower of the onions, although the arbitration agreement was between Georgia Vegetable (the marketing manager) and Dole (who was to provide the containers and transport

the onions). Dole contended that it had no contractual duty to arbitrate a dispute with Manprosa. We held that Dole was merely arbitrating a dispute with Georgia Vegetable, who Dole knew was Manprosa's agent, under the terms of Dole's agreement with Georgia Vegetable.

On original submission we relied upon the arbitration panel's characterization of the contractual relationship established by the marketing agreement between Georgia Vegetable and Manprosa. Our reliance was due to the absence of the actual marketing agreement in the record. Dole has now filed and we have granted a motion to amend the record to include that agreement.

While the arbitration panel had broad authority to interpret the contract between Dole and Georgia Vegetable under the terms of their contract, they do not have such extensive authority to interpret the marketing agreement between Georgia Vegetable and Manprosa. However, we do not believe it is our place in the first instance to interpret the marketing agreement and determine whether, as a matter of law, the arbitration panel was incorrect. Therefore, we remand the cause to the district court to resolve that question before proceeding to follow our original direction.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
Southern Division

DOLE OCEAN LINER EXPRESS,
Plaintiff/Petitioner,

v. **Civil Action No. 1:95-CV-407RR**

GEORGIA VEGETABLE COMPANY,
Defendant/Respondent.

MEMORANDUM ORDER

This matter is before this Court on Motion of the defendant/respondent, Georgia Vegetable Company, Inc. (hereinafter "Georgia Vegetable"), for Summary Judgment, and on Cross-Motion of the plaintiff/petitioner Dole Ocean Liner Express (hereinafter "Dole") for Summary Judgment.

This case has been remanded to this Court by the United States Court of Appeals for the Fifth Circuit to determine whether the arbitrators misinterpreted the provisions of the "Marketing Agreement" governing the relationship between respondent Georgia Vegetable and its supplier, the Nicaraguan company Manprosa. *See Dole Ocean Liner Express v. Georgia Vegetable Co.*, 93 F.3d 166, 167 (5th Cir. 1996) (hereinafter "*Dole II*") . If the Marketing Agreement does not authorize Georgia Vegetable to assert claims against petitioner Dole on Manprosa's behalf for damages arising from Dole's breach of its Service Contract with Georgia Vegetable, then the arbitral decision awarding Manprosa damages must be vacated since Dole would have never agreed to arbitration, or even privity of contract, with Manprosa.

I. GEORGIA VEGETABLE CANNOT POINT TO ANY AUTHORITY PERMITTING IT TO ARBITRATE WITH DOLE ON MANPROSA'S BEHALF.

The Court of Appeals originally found against Dole's submission that the arbitrators exceeded their authority in awarding to Georgia Vegetable damages representing alleged losses by Manprosa. The basis for this conclusion was the Court's belief that "Manprosa explicitly authorized Georgia Vegetable to handle any type of litigation concerning the onions, 'in its own name, just as if it were the owner of said onions.'" *Dole Ocean Liner Express v. Georgia Vegetable Co.*, 84 F.3d 772, 775 (5th Cir. 1996) ("*Dole I*") (emphasis in original). "From Dole's perspective," wrote the Court, 'the two entities were one for purposes of recovering under the [service] contract." *Id.* The Court noted that, to reach these determinations, it was relying on Respondent's (and the arbitrators') characterization of the Marketing Agreement, which was not in the record on appeal.

The absence of the Marketing Agreement was an anomaly, since the document was part of the record of this Court,[24] and therefore should have been transferred to the Circuit in New Orleans. Petition moved to supplement the record by offering the Marketing Agreement and then asked the Court to reconsider its decision in light of what the Marketing Agreement actually says. The Fifth Circuit remanded as a result, directing this Court to consider whether the arbitrators exceeded their authority in interpreting the Marketing Agreement as conferring on Georgia Vegetable

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[24] The Marketing Agreement is Tab A to the original Motion to Vacate Award, filed in this Court on August 10, 1995. Under Rule 11(a) of the Federal Rules of Appellate Procedure, it is an appellant's burden to see that the record is transmitted to the Clerk of the Court of Appeals.

the right to seek damages from Dole on behalf of Manprosa as Manprosa's agent. That is now the issue before this Court, as it was previously when Georgia Vegetable defended the arbitral award to Manprosa on the basis of their alleged agency relationship based on the Marketing Agreement. Georgia Vegetable's arguments, while relying on new positions, remain unpersuasive, and this Court should once again find the Marketing Agreement does not authorize Georgia Vegetable to arbitrate with Dole on Manprosa's behalf.

Before this Court, and in the Court of Appeals, Georgia Vegetable argued that its authority to arbitrate with Dole on Manprosa's behalf arose from an unnumbered paragraph on page five of the Marketing Agreement, in which Manprosa assigned to it the right to "handle any type of litigation" regarding dissatisfaction over product quality on the part of an eventual consignee "in its own name just as if it were the owner of said onions." This was the authority of the arbitrators, and later the Court of Appeals, found to support the conclusion that Georgia Vegetable was Manprosa's "agent" . . . until the Fifth Circuit actually read the Marketing Agreement. As noted, the rehearing was granted on this very point, and the Court noted that in construing the Marketing Agreement (as opposed to the Service Contract[25]), the views of the arbitrators are not entitled to any special regard. *Dole II,* 93 F.3d at 167 ("While the arbitration panel had broad authority to interpret the contract between Dole and Georgia Vegetable under the terms of the contract, they do not have such extensive

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[25] The Service Contract between Dole and Georgia Vegetable is Tab B to the original Motion to Vacate Award, filed in this Court on August 10, 1995.

authority to interpret the marketing agreement between Georgia Vegetable and Manprosa.") .

All this Court need do in order to appreciate the inapplicability of the cited language, and its failure to embrace the kind of case now presented, is to read it in its context. The provision on which Georgia Vegetable used to rely reads in full as follows:

> Should any purchaser be dissatisfied with any of the onions of the grower [*i.e.,* Manprosa], then the receiver [*i.e.* Georgia Vegetable] shall have the right and the responsibility to negotiate a settlement agreement, have said onion shipped to some other purchaser, file a claim under the Perishable Agricultural Commodities Act, handle any type of litigation, or take any other action related to said onions should the need arise. All of this shall be handled at the sole discretion and according to the best judgment of Georgia Vegetable Company, which may handle such matter in its own name just as if it were owner of said onions.

Marketing Agreement, p. 5.

Georgia Vegetable has now abandoned this argument, in an apparent concession that the provision obviously does not provide the requisite authority to represent Manprosa in a dispute with Dole, since Dole was not a purchaser of the onions dissatisfied with their quality. As Georgia Vegetable is now willing to concede the inapplicability of the sole provision upon which the arbitrators relied in finding an agency relationship between Georgia Vegetable and Manprosa, and for a correct interpretation of which the Court of Appeals remanded this case, that should be the end of the matter. Without any basis for doing so, the arbitrators

exceeded their powers, misinterpreting the Marketing Agreement to find an agency relationship between Georgia Vegetable and Manprosa, and consequently including an award of Manprosa's damages in resolving the dispute before them between Georgia Vegetable and Dole.

As a result, Georgia Vegetable has attempted in its Motion for Summary Judgment to find some other authority creating a general principal-agent relationship; specifically, Georgia Vegetable cites the Court to ¶ IX of the Marketing Agreement, a provision never mentioned by the arbitrators, this Court, or the Court of Appeals. See Georgia Vegetable's Memorandum of Law in support of its motion (hereinafter "Georgia Vegetable Summary Judgment Memo."), at 7-8.[26] Dole submits said paragraph is just as clearly inapplicable to the dispute at Bar as the previous "authority." Paragraph IX reads in full as follows:

> THE GROWER (*i.e.*, Manprosa] will retain title to the onions until they have been sold and will bear all risks of loss to the onions until such sale has been accomplished. If there is any loss due to damage during shipping and handling, THE RECEIVER [*i.e.*, Georgia Vegetable) will file damage claims with the shipping company (*i.e.*, Dole] and pursue said claims on behalf of and at the expense of [Manprosa].

Marketing Agreement, ¶ IX (emphasis added).

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[26] According to Georgia Vegetable, this paragraph -- never cited before by any adjudicator in this matter -- "would not only permit, but would require Georgia Vegetable to pursue claims such as those involved in this case against Dole on behalf of Manprosa." Ga. Veg. S.J. Mem. at 7, emphasis in original.

The Court of Appeals did not remand this case for this Court to determine independently the abstract question of whether Georgia Vegetable was Manprosa's agent. Rather, the question presented is only whether the arbitrators misinterpreted the Marketing Agreement as permitting Georgia Vegetable to arbitrate with Dole for damages allegedly suffered by Manprosa by virtue of Dole's failure to supply containers in a manner required by the Service Contract between Dole and Georgia Vegetable. The only provision upon which the arbitrators relied in so interpreting the Marketing Agreement was the aforementioned unnumbered paragraph allowing Georgia Vegetable to represent Manprosa in defending cases brought by **dissatisfied purchasers** of the onions. Thus, Dole submits that the only provision of the Marketing Agreement that should be subject to this Court's review is the one upon which the arbitrators relied. The Court agrees that said provision is inapplicable and does not support the award to Georgia Vegetable of damages on behalf of Manprosa.

Furthermore, Paragraph IX does not confer an agency relationship even if applied. This case does not involve a claim to onions during shipping and handling; it involves Dole's (admitted) failure to supply all of the containers it was required to tender pursuant to its contract with Georgia Vegetable. It could hardly be clearer that this is not what was contemplated by Paragraph IX, which provides that, although the risk of loss of the cargo would not pass from the consignor to Georgia Vegetable, the broker could file claims in the United States on behalf of its Nicaraguan seller if goods were damages or lost in shipment through the carrier's fault.

As the Fifth Circuit panel noted in its modification of the original opinion, the arbitrators are not entitled to deference in their interpretation of the Marketing Agreement, since that is not the contract under which they derived their authority. *Dole II*, 93 F.3d at 167. This Court concludes that Georgia Vegetable had authority to litigate[27] only one type of issue, should it arise: claims involving damage to or loss of the cargo during shipment. It had no power to litigate contract claims, especially under an agreement to which Manprosa was not a party (indeed, a contract that expressly provided at paragraph 12 that "neither party shall have any right or authority to assume or create any obligation binding upon the other") .

This Court agrees that the arbitrators had no power under the contract to enter an award to, and effectively to force Dole to arbitrate with, a non-party, and that in so doing, the panel "exceeded their powers," within 9 U. S. C. § 10(a)(4). This Court therefore may vacate the award of the arbitrators, and substitute relief that is consistent with the facts and law.

The arbitrators incorrectly considered Manprosa's alleged injury and claim for relief in granting an award to Georgia Vegetable, and "exceeded their powers" within 9 U. S. C. § 10(a)(4). Thus their decision must be set aside. In addition, for the very reasons discussed by the Court of Appeals, once the award is so limited, this Court must also enforce the liquidated damages clause contained in the contract giving rise to this dispute.

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[27] Such litigation might have included prosecution of claims against the carrier, as provided in Paragraph IX, or defenses against claims from short-changed consignees, under the unnumbered provision upon which the arbitrators and the Court of Appeals relied.

II. ONCE MANPROSA'S DAMAGES ARE PROPERLY EXCLUDED, THE LIQUIDATED DAMAGES CLAUSE PROVIDES A REASONABLE ESTIMATE OF GEORGIA VEGETABLE'S ACTUAL INJURY.

Before this Court and the Court of Appeals, Dole argued that the arbitrators also exceeded their authority when they awarded damages far beyond those established under the liquidated damages provision agreed by the parties and bought and paid for as a part of their contract. The Fifth Circuit rejected this claim holding that under Mississippi law,[28] "liquidated damages provisions are not enforceable if they are not a **reasonable pre-estimation of damages.**" *Dole I,* 84 F.3d at 774 (emphasis added). The Court referred to the reasonableness test as a "legal standard." *Id.*, which an arbitral tribunal must apply to the evidence. In the view of the Fifth Circuit, the comparison performed by the arbitrators here between estimated (*i.e.*, liquidated) damages, and the claimed actual damages, which stood in a ratio of 1:21.5,[29] showed that they correctly considered the applicable Mississippi standard. *Id.* There was no basis for appellate review of the conclusion that the pre-estimation was unreasonable.

But it is clear that the arbitrators determined the unreasonableness of the contractual litigated damages by comparing them with damages awarded not only to Georgia Vegetable but also to Manprosa. In finding that the liquidated damages provision did not provide "just and

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[28] There is no dispute over the proposition that Mississippi law is the law of decision. *See* Service Contract, ¶ 14.3.

[29] Calculated by dividing $500, the liquidated damages, by $10,728, which the panel found to be the actual loss for both Manprosa and Georgia Vegetable.

reasonable compensation," the panel expressly compared "[t]he $500 per container provision" to the "loss of approximately $10,728 per container." Arbitral decision at 6. The panel itself identified the $10,728 figure as the sum of $1,846.88, representing Georgia Vegetable's lost commission per container and $8,880.75, representing Manprosa's alleged loss of the sale price per container. *Id.* at 7.

The liquidated damages provision, however, was agreed by the parties to represent a pre-estimation only of Georgia Vegetable's damages in the event of Dole's breach, not of Georgia Vegetable's and Manprosa's behalf. The correct calculation, therefore, should have excluded Manprosa's claimed losses. It should have compared the $500 container liquidated damages provision with Georgia Vegetable's loss of $1,846.88. The proper ratio between estimated and actual damages that should be tested for reasonableness, then, is not 1:21.5, which the panel held was unreasonable, but 1:3.7. *See Patrick Petroleum Corp. of Mich. v. Callon Petroleum Co.*, 531 F.2d 1312, 1317 (5th Cir.) (quoting *Massman Constr. Co. v. City Council*, 147 F.2d 925, 928, n. 2 (5th Cir. 1945)), *cert. denied,* 426 U.S. 951 (1976); *Board of Trustees of State Ins. of Higher Learning v. Johnson,* 507 So.2d 887, 889-90 (Miss. 1987). Whether a liquidated damages provision is reasonable is a matter of law for a court to decide[30]. *Farmers Export Co. v. M/V Georgia Prois,* 799 F.2d 159, 162 (5th Cir. 1986) (whether liquidated damages clause is penalty "is a question

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[30] The Fifth Circuit characterized the holding of the arbitral panel as being that "as a matter of law," the liquidated damages provision was void, because it was not a reasonable estimate of actual damages. *Dole I*, 84 F.3d at 774.

of law for the court"); *Superfos Investments Ltd. v. Firstmiss Fertilizer, Inc.*, 821 F.Supp. 432, 440 (S.D. Miss. 1993).

Here the parties agreed that Dole would pay Georgia Vegetable $500 for each container that it failed to deliver. Service Contract ¶ 7.1. They also agreed that Georgia Vegetable would pay Dole $500 for each container delivered that it did not use. *Id.*, ¶ 5. That these estimates are reasonable becomes apparent when they are compared to the actual damages the parties might foreseeably suffer: $500 represents approximately 27 percent of Georgia Vegetable's actual lost commissions of $1,846.88 per container.[31] Had Georgia Vegetable defaulted on its obligations under the contract, Dole would have been entitled to liquidated damages of $500 per container, or 14.3 percent of the $3,500 per container contract price.[32]

Far from under-compensating Georgia Vegetable, then, the liquidated damages provision of the Service Contract between Dole and Georgia Vegetable was a reasonable pre-estimation of the latter's damages in the event of a breach of the agreement by Dole.[33]

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[31] Georgia Vegetable's actual damages, of course, measured by lost commissions, could have been more or less depending upon the purchase price of the onions, which presumably depended on such external factors as the availability of supplies from the other sources, as well as Georgia Vegetable's diligence, skill, and luck in concluding contracts of purchase and resale.

[32] Dole's actual damages too could have varied, depending, for example, upon whether it was able to mitigate by finding another shipper interested in using the containers.

[33] Georgia Vegetable cannot legitimately argue that liquidated damages representing almost one-third of its loss are unconscionable. *See Patrick*, 531 F.2d at 1316, n. 5 (defining "an unconscionable contract as 'one such as no man in his senses and not under a delusion would make on the one hand, and as honest and fair man would accept on the

By impermissibly including Manprosa's damages in their analysis of the liquidated damages provision between Dole and Georgia Vegetable, the arbitrators exceeded the powers granted them under the contract. They held that a ratio between liquidated and actual damages of 1:21.5 is unreasonable, and invalidates the liquidated damages clause as a matter of law. This is the answer to the wrong question since it includes in Georgia Vegetable's actual damages an amount representing the claimed loss on the part of Manprosa. The correct ratio to assay for reasonableness is 1:3.7. As a matter of law, a liquidated damages provision of a contract that estimates damages to be 27 percent of the amount later awarded is well within the bounds of what is commercially and practically reasonable. The rejection of the liquidated damages clause in the Service Contract as an unreasonable estimate of Georgia Vegetable's actual loss was outside the authority of the arbitrators, who had no power to ignore the terms of the contract, or absent unconscionability or unreasonableness, to refuse to apply the parties' agreed terms.

III. NOTHING IN GEORGIA VEGETABLE'S MOVING PAPERS COMPELS A DIFFERENT RESULT

Georgia Vegetable moves for summary judgment without raising any argument, or citing any case, in defense of the proposition that it had the authority to pursue damages claims on behalf of Manprosa. It cannot be inferred in the instant case -- that broad language in an arbitration agreement without more is sufficient to require a party to the contract to arbitrate with a non-party. *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920 (1995). In fact, as

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other. " (quoting *Terre Haute Cooperage, Inc. v. Branscombe*, 35 So.2d 537, 541 (Miss. 1948)).

the record well reflects, and the arbitrators found, Dole refused to contract with Manprosa, and rights and obligations under the Service Contract were expressly limited to the signatories.[34]

Any award by the arbitrators to Manprosa was clearly outside the scope of their powers as defined by the Service Contract enabling the arbitration, since Manprosa was not a party and Georgia Vegetable had no contractual authority to litigate on its behalf. Furthermore, the arbitrators' assessment of the liquidated damages clause's validity is equally tainted, because they analyzed whether the clause was a reasonable estimate of compensation that might eventually be payable to both Manprosa and Georgia Vegetable, again considering an award to a non-party. As this Court previously held, the liquidated damages provision was a fair limitation of the damages agreed to in advance by the only two parties the arbitrators should have considered. For all the foregoing reasons, the arbitral award of $665,113.06 (less an uncontested setoff of $14,000) was in excess of the authority of the arbitrators, and therefore, pursuant to 9 U.S.C. § 10(a)(4), will be set aside.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion of the defendant/respondent, Georgia Vegetable Company, Inc., for Summary Judgment, is hereby **DENIED;**

IT IS FURTHER ORDERED AND ADJUDGED that the Cross-Motion of the plaintiff/petitioner, Dole Ocean

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[34] As this Court previously found, "no one disputes that 'Dole has never agreed, by work or deed, to arbitrate any dispute it might have with Manprosa, with whom it was not even in privity.'" ***Dole Ocean Liner Express v. Georgia Vegetable Co., Inc.,*** 1995 WL 846693 *3 (S.D. Miss., Nov. 22, 1995).

Liner Express, for Summary Judgment is hereby **GRANTED** and it is hereby **ORDERED:**

1) that the arbitrators' decision is hereby **VACATED** inasmuch as it makes any award to Manprosa; and

2) that any award in the arbitrators' decision to Georgia Vegetable Company is hereby limited to a recovery of liquidated damages provided under the Service Contract. Accordingly,

IT IS FURTHER ORDERED AND ADJUDGED that the award assessed against Dole be entered in the amount of $17,000 (liquidated damages of $500 per breach multiplied by 62 breaches, less $14,000 in undisputed freight charges owed to Dole Ocean Liner Express and that the parties shall submit by December 23, 1996, a Final Judgment to be entered in accordance with the foregoing Memorandum Order pursuant to Rule 58 of the Federal Rules of Civil Procedure and Rule 9 of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi,

SO ORDERED AND ADJUDGED this the 11th day of December, 1996.

/s/
Dan M. Russell
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60885
Summary Calendar

DOLE OCEAN LINER EXPRESS,

Plaintiff-Appellee,

versus

GEORGIA VEGETABLE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:95-CV-407RG

Before JONES, SMITH, and STEWART, Circuit Judges
PER CURIAM:[35]

Georgia Vegetable Company, Inc. (Georgia Vegetable) appeals the decision of the district court granting summary judgment in favor of Dole Ocean Liner Express (Dole). In *Dole Ocean Liner Exp. v. Georgia Vegetable Co.*,

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[35] Pursuant to 5th Cir. R. 47.5 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

93 F.3d 166 (5th Cir. 1996) (*Dole II*) we remanded the case to the district court to interpret the Marketing Agreement between Georgia Vegetable and Manprosa of Nicaragua and to determine whether the decision of a panel of The Society of Maritime Arbitrators of the New Orleans Board of Trade was correct as a matter of law.

After reviewing the briefs and the record *de novo*, we conclude that the decision of the district court granting Dole's motion for summary judgment was error. It is undisputed that Dole solicited Manprosa's business, Manprosa introduced Dole to Georgia Vegetable, and Manprosa delegated authority to negotiate carriage to Georgia Vegetable. Dole refused to permit Manprosa to become a signatory to the Service Contract between Dole and Georgia Vegetable because of previous difficulties with Nicaraguan shippers. The arbitration panel held a hearing and considered the Marketing Agreement between Georgia Vegetable and Manprosa, as well as testimony concerning Dole's knowledge of the business relationship between Georgia Vegetable and Manprosa. The arbitrators determined that Dole should have been aware that Georgia Vegetable would seek to enforce the Service Contract on behalf of Manprosa. The arbitration panel's decision is "rationally inferable" from the purpose and language of the contract between Georgia Vegetable and Dole and was, therefore, within the scope of its powers. *See Anderman/Smith Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1218-19 & n. 3 (5th Cir. 1990).

We do not revisit the arbitration panel's damage award to Georgia Vegetable. In *Dole Ocean Liner Exp. v. Georgia Vegetable Co.*, 84 F.3d 772, 774 (5th Cir. 1996) (*Dole I*), we held that the arbitration panel did not exceed its

power in finding, as a matter of law, that the liquidated-damages clause of the contract between Georgia Vegetable and Dole was void and in fashioning the damage award to Georgia Vegetable. Because the district court erred in its construction of the Marketing Agreement as inconsistent with the arbitrators' decision, the court exceeded the scope of remand in addressing this issue. *See Burroughs v. FFP Operating Partners*, 70 F.3d 31, 33 (5th Cir. 1996).

Accordingly, the judgment of the district court is VACATED and the cause is REMANDED to that court to reinstate the arbitration panel award.

VACATE AND REMAND.

Filed: January 8, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60885

DOLE OCEAN LINER EXPRESS
Plaintiff-Appellee

v.

GEORGIA VEGETABLE COMPANY
Defendant-Appellant

Appeal from the United States District Court for the
Southern District of Mississippi, Biloxi

ON PETITION FOR REHEARING

Before JONES, SMITH AND STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

/s/
Edith H. Jones
United States Circuit Judge

Filed: February 19, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
Southern Division

DOLE OCEAN LINER EXPRESS,
Plaintiff/Petitioner,

v. **Civil Action No. 1:95-CV-407RG**

GEORGIA VEGETABLE COMPANY,
Defendant/Respondent.

JUDGMENT REINSTATING ARBITRATOR'S AWARD

This cause came on to be heard on the Remand of this case to this Court from the United States Court of Appeals for the Fifth Circuit by its decision dated January 8, 1998, a copy of which is attached as Exhibit "A", and the Court, being fully advised in the premises, finds that it should enter its Judgment Reinstating the Decision and Final Award of the Arbitrators of the Society of Maritime Arbitrators of the New Orleans Board of Trade, made in the above entitled proceeding on June 30, 1995, a copy of which is attached as Exhibit "B", and it appearing to the satisfaction of the Court that the award of the arbitrators has properly been made, it is hereby

ORDERED, ADJUDGED and DECREED that the said award of the arbitrators be reinstated in its entirety in the sum of Six Hundred Fifty One Thousand One Hundred Thirteen and 06/100 Dollars ($651,113.06); it is, further,

ORDERED, ADJUDGED AND DECREED that Dole Ocean Liner Express shall pay interest on the above

award in the amount of ten percent per annum accruing from July 5, 1995 until paid; it is, further,

ORDERED, ADJUDGED and DECREED that Georgia Vegetable Company, Inc. and Dole Ocean Liner Express shall each pay the amount of Three Thousand Three Hundred Ten and 25/100 ($3,310.25) to the Society of Maritime Arbitrators of the New Orleans Board of Trade for payment in full of fees and expenses relating to arbitration case number S.M.A. 95.1, if not paid previously; it is, further,

ORDERED, ADJUDGED and DECREED that the Clerk of the Court enter such award including interest and the costs and disbursements of this proceeding as judgment in favor of the Petitioner, Georgia Vegetable Company, Inc., on its own behalf and as agent for MANPROSA, and against the Respondent, Dole Ocean Liner Express.

SO ORDERED, ADJUDGED and DECREED this the 24th day of March, 1998.

/s/
Dan M. Russell
U. S. District Judge

Filed: March 25, 1998

§ 10. [Award of arbitrators]; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

1) Where the award was procured by corruption, fraud, or undue means.

2) Where there was evident partiality or corruption in the arbitrators, or either of them.

3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

4) Where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(As amended Nov. 15, 1990, Pub.L. 101-552, § 5, 104 Stat. 2745; Aug. 26, 1992, Pub.L. 102-354, § 5(b)(4), 106 Stat. 946.)